Petition

81-809

No.

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IN THE

Supreme Court of the United States

TERM

HAROLD C. BOYD,
Petitioner,

vs.

MADISON COUNTY MUTUAL INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF UNITED STATES

REED, ARMSTONG, GORMAN AND COFFEY
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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in its interpretation of law applicable to discrimination cases following the establishment of a prima facie case of sex discrimination?

(a) Did the Court err in its rulings regarding the order and allocation of proof?

(b) Did the Court err in its conclusions regarding the District Court's findings or rulings?

(c) Did the Court err in applying the guidelines or requirements set forth in its opinion as regards evidence that "must be introduced" to rebut defendant's proffered reason or explanation?

PARTIES TO THE PROCEEDING

Harold C. Boyd

District Court - Plaintiff

Court of Appeals - Appellee

United States Supreme Court - Petitioner

Madison County Mutual Insurance Company

District Court - Defendant

Court of Appeals - Appellant

United States Supreme Court - Respondent

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TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Harold C. Boyd, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the District Court and of the Court of Appeals are contained in Appendix A and B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1), following the decision of the United States Court of Appeals for the Seventh Circuit, entered July 13, 1981, with said decision reversing the judgment of the United States District Court for the Southern District of Illinois. Petition for Rehearing filed on July 27, 1981 was denied on July 31, 1981.

STATUTORY PROVISIONS

This action was based on alleged violations of 42 U.S.C. §2000e; the questions presented do not involve the statute itself, but rather, the case law implementing said statute.

STATEMENT OF THE CASE

Petitioner, Harold C. Boyd, brought suit under Title VII of the Civil Rights Act, 42 U.S.C. §2000e against the Respondent, Madison County Insurance Company, alleging sex discrimination in his employment. The Respondent had instituted certain policies, which were reduced to writing as set forth in Appendix C, including bonus pay. Petitioner was denied the bonus pay, with the reason being given that it applied to women employees only. At trial, evidence was offered by both sides as to the alleged discrimination and as to the reason given by the Respondent for its action.

The Respondent's position was that the bonus pay was instituted to cure an absenteeism problem among the clerical workers, and that as all their women employees were "clerical" and their men "professionals", only the women qualified to be considered for bonus pay. The Respondent proffered this explanation as their "legitimate, nondiscriminatory reason" for limiting the bonus pay.

Testimony was submitted by both sides relevant to the issue of whether the reason was valid or pretextual, and after hearing the evidence, non-jury, the District Court entered its judgment in favor of the Petitioner, which judgment was reversed by the Appellate Court.

The lower courts agreed on the issues as to jurisdiction, that the equal pay for equal work cases were not applicable, and that the Petitioner had established a prima facie case of sex discrimination. The disagreement and crux of this Petition for Writ of Certiorari involves the law that should be applied once a prima facie case of discrimination is established, and whether the Appellate Court should be permitted to substitute its findings or interpretation of evidence for that of the District Court.

REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI

I.

The Court of Appeals has rendered a decision that (1) is in conflict with certain decisions of the United States Supreme Court as regards the allocation and burden of proof following the establishment of a prima facie case of sex discrimination, and (2) has departed from the accepted and usual course of judicial proceedings by substituting its findings and conclusions regarding the facts in evidence, the credibility of witnesses, and inferences to be drawn from facts, for that of the District Court, as follows:

A.

An Incorrect And Unduly, If Not Impossible, Burden Or Standard Was Placed On The Plaintiff Regarding Proof Of Pretext.

The opinion, page 9, states that in order to prove pretext, the plaintiff "...*must introduce evidence* tending to show other discriminatory treatment by the defendant towards plaintiff or other male employees, or a general pattern of discrimination against male employees." (underlining ours.)

As authority for this standard, the opinion cites two cases, the *Texas Department of Community Affairs* case, and the *McDonnell Douglas* case.

A reading of both of those opinions indicates that neither of them contain any language that would support their usage as citations for the standard or burden recited in the instant opinion as recited above.

For example, on the cited pages 805-805 of the McDonnell opinion, there is no language indicating that the above-recited burden is a "must" or mandatory in nature. The only mandatory language is that "the respondent must be afforded a fair

opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." The McDonnell opinion then discusses or suggests other evidence, such as statistics, or treatment of that respondent during his prior term of employment, that may be relevant in that particular case.

Similarly, in the *Texas* case the only mandatory language was that, "She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision."

The instant opinion states that in order to prove pretext, the plaintiff must introduce certain type evidence tending to show (1) other discriminatory treatment by the defendant towards the plaintiff or other male employees or (2) a general pattern of discrimination against male employees.

This standard or burden is not contained in the cited cases (*McDonnell-Douglas* and *Texas*.) Further, it could not be a proper standard, as it would completely eliminate any and all causes of action based on a violation of the law if they occurred on a "one time basis."

B.

The Decision Of A District Court Should Not Be Reversed Unless It Is Clearly Erroneous. Questions Of Fact, Credibility Of Evidence, And Credibility Of Witnesses Are Matters For Determination Of The District Court. If There Is Evidence In The Record To Support Or Sustain A Finding Or Determination Of The District Court, Then Such Conclusion Or Decision Should Be Upheld On Appeal. These Axioms Of Law Were Not Followed In Certain Respects As Hereinafter Stated.

In the instant case all agree that plaintiff made a prima facie case of sex discrimination. There is also no question that defendant proffered a reason or explanation to refute plaintiff's position, and at this point the McDonnell and Texas cases clearly

state that the plaintiff must show that the reason was a pretext. Headnote 10 of the Texas case indicates that a plaintiff need not introduce separate evidence on this point, but that all evidence introduced both before and after the defendant gives its reason may be considered.

The appellate opinion on page 7, after stating that the burden shifts to the defendant (following the establishment of a prima facie case) states:

> "The District Court failed to consider whether the defendant carried this burden of production."

There is absolutely nothing in the District Court's "Memorandum Opinion" that would serve as a basis for the above statement by the Appellate Court. It indicates, though, a subjective determination by the Appellate Court to substitute its conclusions or findings for that of the District Court.

The issue in the instant case at this point becomes, "Is there evidence in the record to sustain the District Court's determination that defendant's proffered reason was pretextual?"

The Texas Department opinion (Point II, last paragraph) which may well be the latest U. S. Supreme Court decision on these issues of burdens of proceeding and persuasion, states that at this point the plaintiff:

> "...may succeed in this either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly, by showing that the employer's proffered explanation is unworthy of credence."

Either criteria above would seem satisfied by our record.

The record reflects that the written document itself stated:

> "Bonus Time; Employees with excellent attendance record will be rewarded. To accomplish this *all employees* (underlining ours) will earn and accrue bonus pay as follows."

A meeting was held introducing this policy and there was no indication it did not refer to males. The men had no notice it supposedly did not apply to them until the following year, when time came for payment, when one of them was advised "it doesn't apply to men."

The defendant admitted that there was not one item in its minutes or records that supported its contention - except for the amendment of its minutes to add the word "clerical" before the word employees. It is significant that this amendment was not made until some twenty-one months after the police was initiated and coincidentally, after plaintiff filed his complaint.

In addition to the above, the Court opinion indicated that the defendant's reason inferred that only women, rather than men, were habitually absent or needed incentive to continue good attendance practices, which would tend to support a finding of pretext.

The fact that plaintiff "may have proved too much" in showing that this defendant may have improperly classified or stereotyped all women as clerks should not detract from the fact that this evidence was offered (1) to support a finding of pretext, and (2) to show that the proffered reason was a "legal nondiscriminatory" one. There was no evidence by the defendant that they classified all their women employees as clerks prior to this suit being filed. It was clear that certain women were not, in fact, clerks. After amending their records by adding "clerical" to employees, it then became incumbent upon defendant to justify or rationalize their position, and they did so by testifying that "all of the women were clerical employees."

The credibility of the defendant suffered greatly when its general manager stated that Betty Hentz was a "clerical employee," whereas the witness Leardi, a personnel expert, testified that she was an "office manager or supervisor."

To conclude, the fact alone that defendant never, in its records or minutes, stated the proffered reason, or that its records contained nothing compatible with their proffered defense, until they were amended after plaintiff filed his complaint, should be sufficient to sustain a finding of pretext. Certainly, this fact, coupled with the other evidence in the record, indicates sufficient basis for a finding of pretext.

C.

The Appellate Court Opinion Overlooks Or Disregards The Standard Or Criteria For Proof Of Pretext As Set Forth In The Texas Department Of Community Affairs Case.

The Texas case states (Point II, last paragraph) that after the defendant provides its reason or explanation that the plaintiff:

> "...now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the Court that she has been the victim of intended discrimination. She may succeed in this either directly by persuading the Court *that a discriminatory reason more likely motivated the employer* or indirectly by showing *that the employer's proffered explanation is unworthy of credence.*" (underlining ours.)

The District Court apparently found (1) that the proffered explanation was unworthy of credence, or (2) that a discriminatory reason, rather than the proffered one, more likely motivated the employer, or both (1) and (2). Either or both would be sufficient to sustain the Court's decision on this point.

The District Court was the trier of fact, observed the evidence and witnesses as to credibility, and the record contains evidence to support the District Court's findings on the above-recited guidelines.

If the District Court was persuaded that the proffered explanation was unworthy of credence, then the Appellate Court should not substitute its judgment or interpretation of the evidence for that of the District Court.

If the District Court, after its analysis of the evidence, was persuaded that a discriminatory reason, rather than the proffered one, more likely motivated the employer's decision, then that finding should stand.

The Appellate Court opinion would appear to have overlooked or misapprehended the guidelines as set forth in the *Texas* case, as its opinion designates certain evidence that "must be introduced," and as its opinion is void of any comment or discussion on the standards as set forth in that case, as discussed above.

II.

This matter involves a small amount of money - Five Hundred Two ($502.00) Dollars. Having been wronged, the Petitioner believed the matter should be pursued. Counsel assisted him, convinced that his case had merit and satisfied that their efforts would eventually be recompensed through an award for attorney's fees.

Our Federal Court system today appears to be burdened, if not consumed, by litigation involving "big business", multi-million dollar causes, and the constant battles in the field of criminal justice.

The acceptance of this meritorious appeal would be an assurance to "the little guy" that his rights are still of concern to the Nation's highest Court, and that "matters of principle" need not be lost in the shuffle.

CONCLUSION

The Petitioner respectfully requests that a Writ of Certiorari be granted, and that the judgment of the Court of Appeals be reversed, and that the judgment and award of the District Court be reinstated, and that the cause be remanded to the District Court for consideration of additional attorney's fees.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. Civil 76 0014

Harold C. Boyd,
Plaintiff,

v.

Madison County Mutual Insurance Company,
Defendant.

Memorandum Opinion
(Filed May 8, 1980)

Plaintiff brings this suit against his former employer, Madison County Mutual Automobile Ins. Co. under the provisions of Title VII of the Civil Rights Act of 1964, Title 42 USC Sec. 2000e. It is plaintiff's contention that the defendant discriminated against him on the basis of his sex in violation of the statute. Plaintiff originally filed his complaint with the Equal Employment Opportunity Commission (EEOC). The EEOC issued a "right to sue letter" on November 11, 1975 and plaintiff then brought suit in this Court.

This case came on for bench trial on April 28, 1980. At the conclusion of the trial, judgment for the plaintiff was given orally, with a decision to be entered following the submission of affidavits on attorney's fees.

The Court has considered the record established in this case and makes the following findings of fact and conclusion of law. Plaintiff's suit is based primarily on the prohibition against sex discrimination of Title VII of the Civil Rights Act of 1964, Title 42, USC Section 2000e, et seq.

The plaintiff was employed by the defendant from May 1, 1970 to April 25, 1974. Effective January 2, 1973, the defendant implemented Personnel Policy Practice and Procedure, the pertinent portion of which reads as follows: "Employees with excellent attendance record will be rewarded. To accomplish this all employees will earn and accrue bonus pay as follows: . . . Time taken off from work for any reason will be charged against the accrued bonus pay. If any employee is away from work for a period in excess of the employee's accrued bonus pay days the Company will make the determination as to whether the employee's monthly pay should be reduced for excessive time away from work." Plaintiff's Exhibit 1. The evidence shows that "bonus day" bonus payments were made to female employees in amounts which each had earned and accrued at the end of the year following the initiation of this Personnel Policy Practice and Procedure. No male employees were paid a "bonus day" bonus under this Personnel Policy. It is uncontested that male employees salaries were larger than those received by female employees and that absentee records were kept only for female employees with the exception of one male employee whose serious illness necessitated that the defendant, for its own records, substantiate the absences occasioned by the illness. Plaintiff applied for this "bonus day" bonus and defendant denied it to him, with the explanation that no male employees would be paid this bonus. At some point after the initiation of the Personnel Policy, defendant stated that it really intended the bonus to be paid only to "Clerical Employees", all of whom were female, and not to "Professional Employees", all of whom were male. The evidence further showed that the Personnel Policy was initiated in order to reduce absenteeism.

It is clear that the question of whether an employer has engaged in unlawful discriminatory practices is essentially a question of fact to be resolved on a case-by-case basis. *Bullock* v. *Pizza Hut, Inc.*, 429 F. Supp. 424 (MD La. 1977); *Bradford* v. *Sloan Paper Co.*, 383 F. Supp. 1157 (ND Ala. 1974); *Causey* v. *Ford Motor Co.* 382 F. Supp. 1221 (MD Fla. 1974); *Frockt* v. *Oil*

Corp. 344 F. Supp. 369 (SD Ind. 1971). An employer cannot claim that the difference in treatment of employees is based on a factor other than sex if the plaintiff's sex is wholly or partially a motivating factor. Only if sex plays no part in the plaintiff's salary does the differential fall beyond the reach of the law. *Bullock* v. *Pizza Hut, Inc., supra,* 429 F. Supp. at 429.

It would appear that plaintiff's contractual rights were violated by defendant in refusing the payment to an employee of a bonus owed to "all employees", but the question before the Court is whether any of his rights, secured by the laws of the United States, Title 42, USC, Section 2000e, were violated by defendant.

The Court concludes that there was wage discrimination against the plaintiff based entirely upon sex in denying to plaintiff the bonus. It has been decided that men as well as women are protected from sex-based job discrimination. *Diaz* v. *Pan American World Airways, Inc.* 442 F.2d 385 (5th Cir.), *Cert. denied,* 404 U.S. 950, 92 S. Ct. 275, 30 L.Ed. 2d 267 (1971). There is no evidence in the minutes of the meeting of the board that the board decided officially at the time that the bonus would be paid only to "Clerical" help. The minutes and the statement of the policy both show the bonus was to be paid to "all employees". The refusal to pay plaintiff or any other male employees thus deprives plaintiff of compensation on the basis of sex in violation of Title 42 USC Section 2000e.

The inference to be drawn from a policy which pays employees a bonus for not taking days off work must be that such policy was initiated in order to reduce absenteeism. Defendant's decision to pay that bonus only to women employees necessarily carries with it the further inference that only women are habitually absent. Substantial evidence was produced at trial showing that female employees were all classified as "Clerical" employees and compensated at a lower rate than male employees who were classified as "Professional". There was also substantial evidence that the work done by many of these "clerical" employees called for a much higher degree of skill

and responsibility than does mere mechanical clerical work. Defendant's stereotyping female employees in this manner is merely another way of saying that the women employees were paid less, and settled for having no opportunity to advance, because in our society women are willing to settle for less pay and opportunity. Such stereotyping is clearly inappropriate under the law. *Brennan* v. *Prince William Hospital Corp.*, 503 F.2d 282 (4th Cir. 1974); *Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970).

In the instant case, a sex based discrimination that the Court could not have found permissible also worked to deprive the male plaintiff of rights secured to him by the laws of the United States.

Having found that plaintiff was the victim of wage discrimination during the period in which he was eligible to receive a "Bonus day" bonus, the Court finds that he is entitled to the sum of $519.97 as damages. Plaintiff also asks attorney's fees pursuant to 42 USC Section 2000e-5. Plaintiff submits affidavits concerning work done from 1976 through trial in 1980 along with a proper documentation of time sheets with specific items of work involved, the person performing that work, and the amount of time involved. The Court has considered the work involved, the nature of the case, the amount of money involved and the success of counsel's efforts and concludes that the affidavit reflects reasonable attorney's fees.

For the foregoing reasons, we find for the plaintiff in the amount of $519.97 plus an attorney fee in the amount of $4,439.43. Judgment will be entered accordingly.

IT IS SO ORDERED.

DATED: This 8 day of May, A.D. 1980.

/s/ W. L. Beatty
Judge

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 80-1803

Harold C. Boyd,
Plaintiff-Appellee,

v.

Madison County Mutual Insurance Company,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois, Alton Division
No. 76-C-14, William L. Beatty, Judge.

Argued January 8, 1981—Decided July 13, 1981

Before FAIRCHILD, *Chief Judge,* SWYGERT and SPRECHER, *Circuit Judges.*

PER CURIAM. This is an appeal from the district court's order granting judgment in plaintiff's favor on his claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(f)(3). The issues presented in this appeal are: (1) did the trial court err in failing to dismiss the case for lack of jurisdiction because plaintiff failed to meet the 180-day filing requirement, (2) did the trial court err in finding that plaintiff made out a prima facie case of discrimination, and (3) did the trial court err in finding that defendant had not met its burden of showing a legitimate non-discriminatory reason for offering its attendance bonus only to some of its employees. We reverse the deci-

sion of the district court because we find that defendant successfully rebutted plaintiff's prima facie case of discrimination in compensation based on sex.

I

Plaintiff was employed by Madison County Mutual Insurance Company as claims superintendent from May 1, 1970 to April 25, 1974. He was one of four supervisory or management personnel, all of whom were men. Madison County also employed claims adjustors; during 1973 and 1974, all of these positions were filled by men. Both the management personnel and the claims adjustors were considered "professional" employees by Madison County. Defendant classified the rest of its employees as "clerical"; during the years in question, all clerical employees were women.

In December 1972, defendant's board of directors adopted the following policy, to become effective January 2, 1973:

> Employees with excellent attendance records will be rewarded. To accomplish this all employees will earn and accrue bonus pay as follows:
>
> • • •
>
> Those employees who have completed their first year of employment will accrue three bonus pay days during their second year of employment.
>
> • • •
>
> Time taken off from work for any reason will be charged against the accrued bonus pay.
>
> If any employee is away from work for a period in excess of the employee's accrued bonus pay days the Company will make the determination as to whether the employee's monthly pay should be reduced for excessive time away from work.

The evidence adduced at trial established that defendant paid attendance bonuses only to clerical employees, that attendance records were kept only for clerical employees,[1] that the highest paid clerical employee earned $600 a month, and that plaintiff earned $1,300 a month. After plaintiff's complaint was investigated by the Equal Employment Opportunity Commission (EEOC), defendant's board of directors amended the bonus policy by specifying that it applied only to clerical employees. Clinton Rogier, defendant's secretary-treasurer and general manager, testified that this amendment reflected the board's intent when it originally adopted the policy. He further testified that the purpose of the policy was to reduce absenteeism among clerical employees, and that when the policy was adopted there was no absenteeism problem with the adjustors.

Plaintiff filed a complaint with the EEOC alleging that defendant discriminated against him on the basis of his sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a),[2] when it made all female employees but no male employees eligible for attendance bonuses. The EEOC investigated, then issued a right-to-sue letter on November 11, 1975. Plaintiff filed his complaint in the district court on February 11, 1976; after a bench trial, the district judge entered judgment for plaintiff on May 8, 1980. This appeal followed.

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[1] With the exception of one male employee, whose serious illness necessitated that defendant record his absences.

[2] The statute provides in relevant part: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ."

II

Section 706(e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred.

Section 706(c), 42 U.S.C. § 2000e-5(c), provides in part:

> In the case of an alleged unlawful employment practice occurring in a State . . . which has a State . . . law prohibiting the unlawful employment practice alleged and establishing or authorizing a State . . . to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State . . . law, unless such proceedings have been earlier terminated . . . .

In *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. 4851 (No. 79-616) (June 23, 1980), the Supreme Court held that these two sections of the statute, read together, mean that a charge is not filed for purposes of section 706(e) until after the deferral period has expired. Thus in the case at bar, plaintiff's charge was not filed on October 16, 1974, apparently the date the EEOC received plaintiff's allegations of a Title VII violation. Rather, the charges

were filed on December 16, 1974, sixty-one days after the EEOC forwarded Boyd's letter to the state agency.[3] Plaintiff therefore filed his charges within the 300-day time limit.

The time period starts to run from the date on which the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e). Defendant contends that February 4, 1974, the date that defendant paid attendance bonuses earned during 1973 to the clerical employees, is the date of the alleged unlawful practice. Plaintiff's position is that the attendance bonus policy was a Title VII violation that continued until April 28, 1974, the date of plaintiff's termination.[4] We agree with the district court's finding that this was a continuing violation.[5] *See Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188-89 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971) (employer's maintenance of allegedly discriminatory retirement plan held to be continuing violation); [1976] EEOC Compl. Manual ¶ 4102, § 208.1 ("a policy is by nature continuing"). Therefore, plaintiff's filing of his charge with the EEOC was timely.

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[3] The EEOC's letter dated October 16, 1974 advised plaintiff that it was sending a copy of his letter to the Illinois Fair Employment Practices Commission. We therefore treat the state agency proceedings as having been instituted on that date. *Mohasco Corp.* v. *Silver*, 48 U.S.L.W. 4851, 4853 (No. 79-616) (June 23, 1980).

[4] A continuing violation ceases, and the time period for filing an employment discrimination charge begins to run, when the employment relationship is terminated. *See In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1149 (7th Cir. 1978); *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 473 (D.C. Cir. 1976).

[5] Defendant contends that the attendance bonus policy could not be a continuing violation because clerical employees who terminated their employment during a calendar year did not receive partial attendance bonuses for the portion of the year prior to their terminations. The fact that the bonuses were paid only to those employees who remained with the company for the full calendar year does not change the nature of the violation. It may indicate that plaintiff is not entitled to a bonus for the part of 1974 prior to his termination, but we do not need to reach that issue.

III

The essence of plaintiff's complaint is that defendant discriminated against him on the basis of sex by offering an attendance bonus to all female employees but no male employees. Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (the Bennett Amendment), provides:

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act, 29 U.S.C. § 206(d)].

The Equal Pay Act, 29 U.S.C. §206(d)(1), provides in part:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) a differential based on any factor other than sex . . . .

According to defendant, section 703(h) of Title VII limits the prohibition against sex-based discrimination in compensation to situations in which the employees are performing the same or substantially the same work, in the manner that the Equal Pay Act is limited. Because plaintiff's work entailed different responsibilities from those of defendant's female employees, defendant argues, plaintiff can raise no claim of sex discrimination in compensation. We disagree.

In *County of Washington* v. *Gunther*, 49 U.S.L.W. 4623 (No. 80-429) (June 8, 1981), the Supreme Court rejected the broad interpretation of the Bennett Amendment urged by

defendant in the instant case. In *Gunther*, female guards at a county jail brought an action for sex discrimination under Title VII. Plaintiffs alleged that the defendant intentionally discriminated against them by setting the pay scale for female guards not only lower than the scale for male guards but also lower than the level indicated by defendant's own evaluation of the worth of the female guards' jobs. The defendant urged that the Bennett Amendment restricted claims of sex-based wage discrimination to claims that could be brought under the Equal Pay Act; thus, because the job of female guard was not substantially equal to the job of male guard,[6] defendant argued that plaintiffs failed to make out a violation of Title VII.

The Supreme Court, after analyzing the legislative history and administrative interpretation of the Bennett Amendment and the purposes of Title VII, concluded that a plaintiff may state a claim of sex-based discrimination in compensation under Title VII without proving that he or she was performing a job substantially equal to that held by a higher-paid member of the opposite sex. *Id.* at 4629. The Court found that "only differentials [in compensation] attributable to the four affirmative defenses of the Equal Pay Act are 'authorized' by that Act within the meaning of § 703(h) of Title VII." *Id.* at 4626.

Once it is established that the Bennett Amendment and the Equal Pay Act standards do not govern plaintiff's claim, classic Title VII analysis must be applied to this case. *See Texas Dep't of Community Affairs* v. *Burdine*, 49 U.S.L.W. 4214 (1981) *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). We agree with the district court that plaintiff's evidence

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[6] The district court found that the jobs were not substantially equal because "the male guards supervised more than 10 times as many prisoners per guard as did the female guards, and . . . the females devoted much of their time to less-valuable clerical duties." 49 U.S. L.W. at 4624.

established a *prima facie* case of sex discrimination. Women were eligible for bonuses. Men were not.

Once a *prima facie* case of sex discrimination is established, the burden then shifts to the defendant to produce admissible evidence that would allow the trier of fact rationally to conclude that the decision not to award plaintiff the attendance bonus was based on a legitimate, nondiscriminatory reason. *See Texas Dep't of Community Affairs, supra,* at 4216-17. The district court failed to consider whether defendant carried this burden of production. The record, however, demonstrates that defendant did show that it had a ligitimate, nondiscrimininatory reason for awarding attendance bonuses only to those employees it classified as clerical, all of whom happened to be women, thereby rebutting plaintiff's *prima facie* case.

Mr. Rogier, defendant's general manager, testified that the policy was implemented in response to a serious absenteeism problem with the clerical staff. Plaintiff himself testified that at the general meeting in which this policy was introduced, there was some talk that it was being implemented to correct the absenteeism problem of certain employees.

All clerical employees were required to be in the office eight hours a day, five days a week. Their coffee breaks and lunch hours were tightly regulated, records were kept of their attendance,[1] and they were docked for sick days. In contrast, plaintiff and other claims adjustors were free to come and go from the office as they pleased. Much of their time was spent on the road, and they were not docked for lunch hours in excess of one hour, nor were they docked for sick days. No attendance records were kept for claims adjustors, with the exception of one who was chronically ill.

---

[1] Plaintiff argues that no personnel records were kept until 1979. The record indicates that this is true, but it also shows that attendance records, as opposed to personnel files, were kept of clerical employees for 1973 and 1974. Defendant introduced the attendance records for eight clerical employees as its Exhibit 1.

Plaintiff introduced evidence indicating that several clerical employees were wrongly classified as such, from which it could be inferred that defendant was guilty of illegal sex stereotyping. But evidence that all the women employees were classified as clerical workers, and all the male employees were claims adjustors, is irrelevant to plaintiff's case. If he introduced this evidence to show that defendant's explanation that the attendance bonus was intended only for clerical employees (all of whom happened to be women) was merely a pretext for a sexually discriminatory decision, he proves too much.

In order to prove a pretext, which plaintiff is entitled to do to rebut defendant's showing of a legitimate, nondiscriminatory purpose, *see Texas Dep't of Community Affairs, supra,* at 4216; *McDonnell Douglas Corp., supra,* at 804-05, he must introduce evidence tending to show other discriminatory treatment by the defendant towards plaintiff or other male employees, or a general pattern of discrimination against male employees. *Id.* Plaintiff's evidence proves the opposite—that if anyone was discriminated against, it was the female, clerical employees. But plaintiff is not the person to bring that claim, and to allow him to rebut defendant's proof of a legitimate business purpose with evidence of discrimination against female employees, rather than male employees, is an affront to the meaning and intent of Title VII. We therefore find that defendant successfully rebutted plaintiff's *prima facie* case of sex discrimination, and that plaintiff was unable to show that defendant's business purpose was pretextual.

Accordingly, the judgment of the district court is REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

APPENDIX C

MADISON COUNTY MUTUAL AUTOMOBILE INSURANCE COMPANY
INCORPORATED 1920 · UNDER ILLINOIS INSURANCE LAWS
OFFICES: EDWARDSVILLE NATIONAL BANK & TRUST CO. BLDG.
PHONE: 656-3410
Edwardsville, Illinois

EFFECTIVE January 2, 1973

POLICY:: PRACTICE :: PROCEDURE
Of This COMPANY

Since the Madison County Mutual Automobile Insurance Company is a mutual organization depending upon the confidence and good will of its members and all who use its facilities. It is important that all employees are given every consideration which will make them feel that they are an integral part of the association and important and valuable to the successful operation of the Company.

WITH THIS IN MIND AND WITHOUT REGARD TO RELIGION, COLOR RACE, SEX, OR NATIONAL ORGIN THE FOLLOWING PERSONELL POLICIES AND PRACTICES ARE APPROVED:

TIME: The Company operates on a calendar year(January 1, thru December 31,)

HOURLY SCHEDULES: The office will be open Monday thru Friday from 8:00 a.m. till 5:00 p.m. allowing lunch hou from 12 till 1. The front office will remain open thru the lunch hour - Employees in that department will be staggering their lunch hours (11:30 thru 1:30). The claim department will retain one or as many employees as they deem adequate to service the policy-holders during the noon hour.

PAY PERIOD: Pay day shall be monthly and at the end of each month

PAY ROLL DEDUCTIONS:
Social Security - 1/2 paid by Employee and 1/2 paid by Employer
Federal withholding income tax - Illinois Income Tax
and; any other deductions employees may sanction

INSURANCE

The Company provides a pension plan which the employee is eligible to participate after a year of employment with the Company and has attained the age of 25. If employee is not 25 the employee will be provided with term life insuremce until the employee has reached the age of 25 then insurance converts to pension plan (Plan may be reviewed on demand). Hospital and Medical insurance is provided; along with long term disability.

SALARIES:

Salaries are set by management and reviewed peridically by the Executive Committee. A coffee break of 15 minutes is permitted in the morning session and 15 minutes in the afternoon session, these to be staggered among the employees in grops of not more then 5 or 6 to a group. The management reserves the right to withdrew this privilege at their discretion.

VACATION : A vacation schedule will be prepared in December indicating the number of employees to be granted vacation at the same time. Choice of vacation time will be made by employees based on length of service with the Company

VACATIONS: An employee who has served continually for a 1 (one) year period shall then be entitled to a 2 weeks vacation and each subsequent year till the employee has reached 10 years of Continued service then the employee shall receive 3 weeks and subsequently thereafter.

HOLIDAYS:

PAID HOLLIDAYS FOR ALL EMPLOYEES FOR 1973 HAVE BEEN DETERMINED BY THE EXECUTIVE COMMITTEE AS FOLLOWS:

Monday . . .January 1 . . . . .New Years
Monday . . .February 12, . . . Lincoln's Birthday
Monday . . . May 28th, ...MemOrial Day
Wednesday .. July 4th. . . . . Independence Day
Monday . . . September 3 . . . Labor Day
Monday . . . October 8 . . . . Columbus Day
Monday . . . November 11 . . . Vetran's day
Thursday ... November 22 . . . Thanksgiving Day
Tuesday . . .December 25 . . . Christmas Day

BONUS TIME:

Employees with excellent attendance record will be rewarded. To accomplish this all employees will earn and accrue bonus pay as follows :

Length of Service	Accrued Bonus days
1 Day through 1 year	0
1 year through 2 years	3
2 years through 3 years	6
3 years through 4 years	9
4 years and over	12

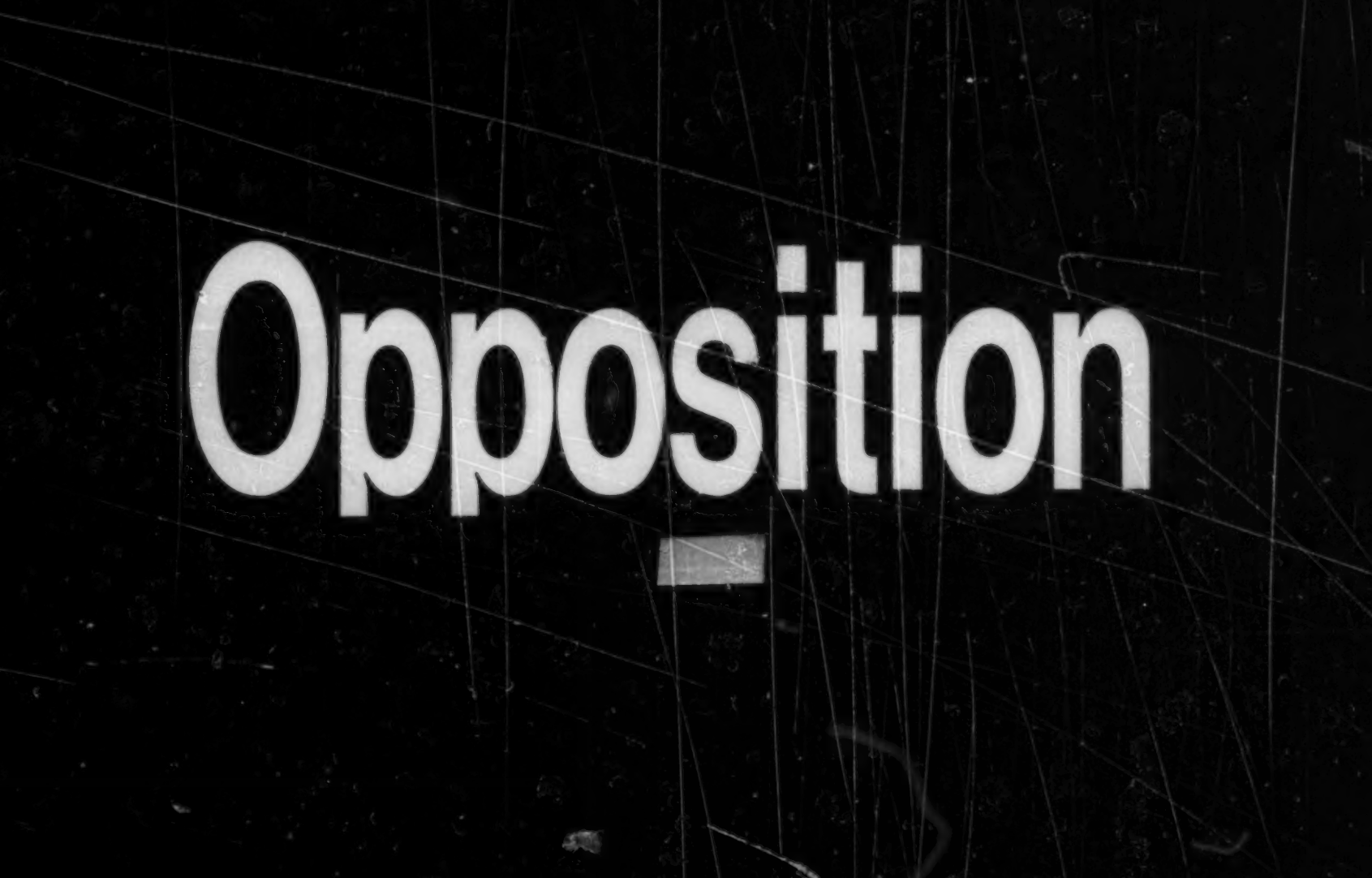
Those employees who have completed their first year of employment will accrue three bonus pay days during their second year of employment. If they have had a perfect attendance record during their second year of employment they will receive a bonus of bonus of three days pay at the end of their second year of employment.

When an employee completes four years of employment, 12 days of bonus pay will accrue during the fifth year. Employees in this category who have had a perfect attendance record during their fifth year of employment will receive a bonus of 12 days pay at the end of their fifth year of service with the Company.

Time taken off from work for any reason will be charged against the accrued bonus pay.

If any employee is away from work for a period in excess of the employee's accrued bonus pay days the Company will make the determination as to thether the employees monthly pay should be reduced for excessive time away from work.

The management is authorised and empowered to employ, promote, demote, transfer and the right to dismiss if the employees conforms to or does not conform to that work assignment. Any discussion of the employee may be taken up with the management which will be held confidential.


Opposition

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CLERK

No. 81-809

IN THE

Supreme Court of the United States

HAROLD C. BOYD,
Petitioner,

v.

MADISON COUNTY MUTUAL INSURANCE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT MADISON COUNTY MUTUAL INSURANCE COMPANY

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT MADISON COUNTY MUTUAL INSURANCE COMPANY

Petitioner, Harold C. Boyd, has asked this Court to issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 31, 1981, which reversed a judgment of the United States District Court for the Southern District of Illinois.[1] Respondent Madison County Mutual Insurance Company (hereinafter "Madison County") urges this Court to deny the instant Petition.

[1] The opinion of the District Court is reprinted at Page A-1 of the Appendix to the instant Petition for Writ of Certiorari and the opinion of the Court of Appeals is reprinted at Page A-5 of that Appendix.

STATEMENT OF THE CASE

Petitioner brought suit under Title VII of the Civil Rights Act of 1964 against his former employer, Respondent Madison County, for alleged reverse sex discrimination.

Mr. Boyd was employed by Madison County as its Claims Superintendent from 1970 until April, 1974. During his employment, Mr. Boyd was one of four individuals in a supervisory or management capacity at Madison County. These four individuals were all men.

In addition to these four employees, Madison County employed claims representatives or adjustors. In 1973 and 1974, all of these adjustors were men.

Madison County generally divided its employees into two broad classifications: professional and clerical. The company considered the four management positions and the adjustors to be proessional positions. Madison County did not employ any men other than these professionals. The clerical positions were held by women.

In December, 1972, the Board of Directors of Madison County, who were all men, adopted a personnel policy to become effective in January, 1973. The policy is reprinted at page A-14 of the Appendix to the instant Petition for Writ of Certiorari. Mr. Boyd relies upon the following provision of that policy:

> "Employees with excellent attendance records will be rewarded. To accomplish this all employees will earn and accrue bonus pay as follows:
>
> • • •
>
> Time taken off from work for any reason will be charged against the accrued bonus pay.

> If any employee is away from work for a period in excess of the employee's accrued bonus pay day the Company will make the determination as to whether the employee's monthly pay should be reduced for excessive time away from work." (Pet. A-15).

Mr. Boyd's claim of reverse sex discrimination is that he was not considered eligible for the above bonus.

Throughout 1973 and 1974, Madison County kept attendance records with respect to its clerical workers. It did not maintain any attendance records with respect to Mr. Boyd or with respect to the other managers or adjustors. If Mr. Boyd was absent from work his pay was not deducted. Mr. Boyd testified that his attendance in 1973 and 1974 was excellent.

Mr. Boyd's salary was $1,300.00 per month. The highest paid female employee received $600.00 per month.

Mr. Rogier, defendant's General Manager, was at all relevant times a member of the Madison County Board of Directors. He testified that the bonus policy was adopted to cure absenteeism of Madison County's clerical employees. Mr. Boyd testified that when the policy was explained to him, he was informed that it had been adopted to correct some absenteeism with some employees and that in 1972 there was no absenteeism problem with the insurance adjustors.

After the EEOC investigated Mr. Boyd's complaint of reverse sex discrimination and found no violation of Title VII, the Board of Directors of Madison County amended the policy by inserting the word "clerical" before the word "employees". Mr. Rogier testified that this amendment accurately reflected the Board's intent in 1972 when it adopted the policy.

SUMMARY OF ARGUMENT

Petitioner, Mr. Boyd, makes two contentions in seeking review of the Seventh Circuit's decision: (1) first, that the Court of Appeals placed an improper burden upon petitioner in connection with proof of a pretext, and therefore, that its decision conflicts with the decisions of this Court and those of other Circuits, and (2) that the Court of Appeals improperly substituted its interpretation of the evidence for that of the District Court.

These contentions are without merit.

No conflict exists between the decision below and decisions of this Court and other Circuits. As discussed in the following section, all Courts are in accord that once the employee's *prima facie* presumption of discrimination is rebutted by the employer's evidence, the employee must go forward with the evidence.

Likewise, plaintiff's claim that the Seventh Circuit "departed from the accepted and usual course of judicial proceedings by substituting its findings and conclusions regarding the facts in evidence" (Petition, p. 4) does not rise to the level of a conflict with this Court or with other Circuits. The issue presented by this latter contention is one of evaluating the particular facts established in the trial court. No conflict or other grounds are presented to warrant the intervention of this Court on writ of certiorari.

REASONS FOR DENYING THE WRIT

1. No Conflict With Any Decision Of This Court Or That Of Any Circuit Is Shown Regarding The Employee's Burden Of Going Forward With The Evidence To Establish That An Employer's Legitimate, Nondiscriminatory Reason For An Employment Decision Is A Pretext For Discrimination.

After finding that Mr. Boyd had established a *prima facie* case of reverse sex discrimination, the Seventh Circuit found that Madison County "did show that it had a legitimate, non-discriminatory reason for awarding attendance bonuses only to those employees it classified as clerical, all of whom happened to be women, thereby rebutting plaintiff's *prima facie* case." (Pet. A-12). The portion of the appellate court's opinion which Mr. Boyd attacks is as follows:

> "In order to prove a pretext, which plaintiff is entitled to do to rebut defendant's showing of a legitimate, non-discriminatory purpose, *see Texas Dep't of Community Affairs* [v. *Burdine*, 49 U.S.L.W. 4212 (1981)] at 4216; *McDonnell Douglas Corp.* [v. *Green*, 411 U.S. 792 (1973)] at 804-05, he must introduce evidence tending to show other discriminatory treatment by the defendant towards plaintiff or other male employees, or a general pattern of discrimination against male employees. *Id.* Plaintiff's evidence proves the opposite—that if anyone was discriminated against it was the female, clerical employees. But plaintiff is not the person to bring that claim, and to allow him to rebut defendant's proof of a legitimate business purpose with evidence of discrimination against female employees, rather than male employees, in an affront to the meaning and intent of Title VII". (Pet., A-13).

Petitioner complains that the *Burdine* and *Green* decisions contain "no language indicating that the above-recited burden is a 'must' or mandatory in nature." (Pet., 4). In claiming that

the burden of establishing pretext is not "mandatory", petitioner, by necessity, adopts the position that proof of pretext is "discretionary" or "optional". The following portion of *Burdine* demonstrates that the burden is indeed mandatory in that any plaintiff failing to establish pretext cannot prevail on his claim:

> "The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff [citation omitted].
>
> • • •
>
> "The burden that shifts to the defendant [once plaintiff establishes a *prima facie* case], therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.
>
> • • •
>
> "The plaintiff retains the burden of persuasion. [He] now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." at 4216.

Mr. Boyd is not complaining that he was denied the "opportunity to demonstrate that the proffered reason was not the true reason for the employment decision" as required by *Burdine*. Rather, he is arguing that the Seventh Circuit erred in regarding this "opportunity" as being a prerequisite, or "must", to his recovery. The very fact that the burden is on the employee to establish a pretext can only mean that the petitioner *must* go forward with the evidence. If this were not so, then the burden would remain on the employer to prove by a preponderance of

the evidence that it had not discriminated against the employee. This clearly is not the law:

> "The employer need not persuade the trier of fact that he was actually motivated by his asserted reason. His burden is satisfied by articulating a reason that raises a genuine issue of fact as to whether there was illegal discrimination. *Jackson* v. *City of Killeen*, 654 F.2d 1181 (5th Cir. 1981). If the employer does show such a reason, the burden of production shifts back to the plaintiff to prove that the asserted reason was merely a pretext to shield a discriminatory motive." *Sanchez* v. *Texas Commission on Alcoholism*, 660 F.2d 658, 661 (5th Cir. 1981), relying on *Burdine, supra.*

The Seventh Circuit did not place an incorrect or undue burden upon petitioner. It's decision is not in conflict with *Green* or *Burdine.*

2. No Conflict With Any Decision Of This Court Or That Of Any Circuit Is Shown Regarding The Seventh Circuit's Findings Regarding Madison County's Evidence Of A Legitimate, Nondiscriminatory Reason For Its Treatment Of Petitioner.

Petitioner argues that the Seventh Circuit violated some "axioms of law" and improperly substituted its opinion for that of the trial court. (Pet., 5-8). In particular, petitioner challenges the ability of the Court of Appeals to state that "The District Court failed to consider whether the defendant carried this burden of production [of a legitimate, nondiscriminatory reason]." (Pet., 6). However, a review of the District Court's opinion reveals that the trial court did not consider whether Madison County had articulated a nondiscriminatory reason for its treatment of Mr. Boyd. (Pet., A-1-A-4). The appellate court's observation of this omission was not erroneous.

In addition, in reaching its decision, the Court of Appeals did not substitute its own opinion regarding the credibility of any of

the witnesses. The testimony of Mr. Boyd confirmed, rather than contradicted, the testimony of Madison County's General Manager that there was an absenteeism problem among the clerical staff that the bonus policy was intended to alleviate. The Seventh Circuit did not substitute any factual findings for those of the trial court, however, it did make its own independent determination as to whether those facts constituted proof of reverse sex discrimination under Title VII. The Seventh Circuit's action, in making this determination, was not in conflict with that of other courts. *See e.g., Sanchez, supra,* at 661 ("the ultimate finding on discrimination must be made independently by this Court.").

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari to the court below should be denied.

Respectfully submitted,

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